switched telephone network, even though he is authorized for such interconnection. (Tr. 146). Interconnection is one of the requisite elements for CMRS status. 47 C.F.R. § 20.3. In any event, even assuming Sobel's 800 MHz repeaters are properly classified as CMRS, they were still deemed PMRS until 10 August 1996, the PMRS-to-CMRS conversion date. See Third Report and Order in GN Docket No. 93-252, 9 FCC Rcd 7988 at ¶¶ 408-411. Thus, assuming without conceding that Motorola, Inc. applies only to PMRS licensees, it applied to Sobel until at least August of 1996, and it was the governing precedent at the time he entered into the arrangement with Kay. Accordingly, if the Bureau wants to hold Sobel responsible for knowledge of and compliance with a particular legal policy statement regarding transfer of control, *Motorola, Inc.* would be more apt than *Intermountain Microwave*. In any event, as the following discussion shows, Sobel retained adequate licensee control of his stations whether measured under *Motorola*, *Intermountain Microwave*, or any combination.

(2) THE INTERMOUNTAIN MICROWAVE INDICIA

(a) Does the licensee have unfettered use of all facilities and equipment?

44. Sobel made a business arrangement with Kay in which Kay would lease the 800 MHz repeater equipment to Sobel and, where necessary, sublease transmitter and antenna space to Sobel, with payment to come out of the first $600 of monthly revenue per repeater. The Bureau nonetheless states that "Sobel was given no title, interest, or control over the equipment except to the extent he was granted permission to use Kay's equipment." *WTB Findings* at 12. It is not clear what the Bureau would require. Surely the Bureau is not claiming that licensees may not lease rather than purchase repeater equipment. The Commission has clearly stated that the licensee may establish its requisite "proprietary interest [in the station equipment] either as owner *or lessee*." *Motorola, Inc.* at ¶ 18. The initial $600 monthly revenue to which Kay is entitled is primarily to compensate him for leasing the repeater equipment and the site space to Sobel. The oral lease arrangement was later codified in the written agreement. "Agent shall lease to Licensee all equipment necessary to construct and operate the Stations. All rents to be collected by Agent for lease of equipment to Licensee shall be deemed by the Parties to be a portion of Agent's compensation for services described herein." (SBL Ex. 3, p. 3, ¶ IV)

(b) Who controls daily operations?

45. The Bureau rattles off a litany of things that Kay does that Sobel either does not do, does to a lesser degree than does Kay, or does to the same degree for his "managed" stations as he does for Kay's stations. *WTB Findings* at 42-48). From this premise the Bureau contends that Kay, rather than Sobel, controls daily operations. What the Bureau fails to grasp and appreciate is the true nature of the arrangement between Sobel and Kay. (Tr. 90, 128, 153, 190-192, 374-376) If the mere fact that Kay is the one who contracts with customers and collects revenues constitutes an unauthorized transfer of control, then the Commission will soon have to begin enforcement proceedings against large cross-sections of the mobile wireless communications industry for which resale and channel capacity lease arrangements are a way of life.

46. The Bureau attempts to negate the fact that Sobel is intimately and actively involved in virtually every aspect of his 800 MHz repeaters by arguing that his involvement is subject to Kay's ultimate control. *WTB Findings* at 41. This simply is not true; in fact, it is the other way around. Kay is involved in the stations only because Sobel voluntarily chose to enter into a business arrangement with Kay. It has always been understood between the parties that the Stations belonged to Sobel and that he had the final say. Sobel has exercised his authority over the placement of customers and the rates to be charged. He has set the price to be paid when a station was sold, and he even vetoed one proposal to purchase all of his stations for $1.5 Million. Although Kay handles the billing and collection of monies for services, consistent with his role as a reseller, Sobel has full and unrestricted access to the billing records. Moreover, it is Sobel, not Kay, who monitors the revenue levels to determine when the stations have achieved the $600 revenue, triggering Sobel's entitlement to one-half of the additional revenue.

47. Even the written agreement, which was not entered into until a considerable time after Kay and Sobel had established their relationship, but which the Bureau wishes to focus almost exclusively on, gives Sobel ultimate control.[13] Section VIII of the written agreement expressly provides:

[13] The Bureau's concern that the agreement has a lengthy term and can not be terminated by Sobel is ill-founded and not entirely factually accurate. Even in the absence of specific termination provision, Kay's performance "under the agreement is subject to an implied covenant of good faith and fair dealing, as well as an obligation to perform [his] duties in a workmanlike manner." *Ellis Thompson Corp., Summary Decision of Administrative Law Judge Joseph Chachkin*, 10 FCC Rcd 12554, 12557 (1995). This has been held to give the licensee the requisite authority to terminate the agreement, when appropriate, even in the absence of a limited term or specific termination provision. *Id.*

> Licensee shall retain ultimate supervision and control of the operation of the Stations. Licensee shall have unlimited access to all transmitting facilities of the Station, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with FCC Rules and shall be able to direct any control point operator employed by Agent to discontinue any and all transmissions which are not in compliance with FCC Rules. All contracts entered into with end users of the Stations' services shall be presented to the Licensee, either by original proposed contract or copy thereof, before such contracts go into effect, and Licensee shall have the right to reject any such contract within five (5) days of presentation, however, such rejection shall be reasonable and based on the mutual interests of the parties. Licensee shall have the right to locate the Stations' transmitting facilities at any place of Licensee's choosing, provided, however, that after the original construction of the transmitting facilities of the Stations is completed and/or following execution of this agreement, Licensee shall give sixty (60) days notice to Agent of any future relocation of any of the Stations. Such relocation shall only occur if it is in the best interest of both Parties.

(SBL Ex. 3, p. 5, ¶ VII)[14] The Bureau disingenuously asserts that Sobel's rights are limited merely to stopping noncompliant transmissions, *WTB Findings* at 42, but this interpretation is supported neither by the plain language of the contract nor the actions of the parties. The first sentence quoted above is clear, self-contained, and unequivocal: "Licensee shall retain ultimate supervision and control of the operation of the Stations." Any qualifications on Sobel's control in the remainder of the paragraph are limited to areas necessary to protect Kay's reasonable rights and expectations as a reseller of airtime. Thus, Kay is assured that Sobel will not discontinue or direct the discontinuance of transmissions unless they " are not in compliance with FCC Rules." Kay is assured that any customer contracts not vetoed by Sobel within five days will be honored. Kay is further assured that Sobel will not relocate transmitting facilities without 60 days prior notice and unless such relocations " is in the best interest of both [p]arties." The fact that it

[14] The agreement goes on to state: "Except as provided specifically herein, nothing contained herein shall provide to Licensee the ability to supervise directly any personnel employed by Agent." (SBL Ex. 3, p. 5, ¶ VIII.A) The Bureau suggests that this deprives Sobel of appropriate personnel authority under the fourth *Intermountain Microwave* factor, but this is not the case. The provision itself excludes matters "provided specifically herein," and thus preserves Sobel's rights to supervise Kay employees as to matters expressly stated in the rest of paragraph VIII or in other parts of the agreement that relate specifically to Sobel's stations. The purpose of this provision was to preserve the status of Kay and Sobel as independent contractors vis-à-vis one another, and this is clear when the provision is read in conjunction with paragraph V of the agreement. (SBL Ex. 3, p. 3, ¶ V). Indeed, that subparagraph VII.A was considered necessary at all is an indication of the extent of oversight authority given to Sobel in paragraph VII.

was necessary to spell out these few specific limitations of Sobel's authority compels an interpretation that the agreement otherwise gives him broad and unqualified control.[15]

48. According to the Bureau, the work that Sobel does do with respect to his 800 MHz stations is done in his role as an independent contractor and is solely at Kay's pleasure. *WTB Findings* at 42. This is a gross mischaracterization of the actual situation as reflected in the record. It is true that Sobel performs services with respect to the managed stations and for which he is paid at the same hourly rate for contracting work he also does for Kay's stations, but this was by design on Sobel's part. Sobel viewed this arrangement as a convenient way for him to derive some initial income from the stations, with the understanding that he would later also receive one-half of the monthly revenue in excess of $600 per repeater. As Sobel testified, he might have done this another way. He might have decided to treat all services performed with respect to his 800 MHz stations as "sweat equity" for which he would receive no immediate compensation, but in that case he would have almost certainly reduced the $600 revenue figure so that he would begin sharing in the revenues at an earlier stage. The fact that Sobel made a business choice between two equally legitimate alternatives does not suggest a transfer of control; indeed, it is yet another example of his exercising control over policy matters.

(c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

49. The Bureau repeatedly harps on the fact that Kay prepared most of Sobel's the 800 MHz applications. This is true, but what is the Bureau's point? Wireless applicants every day rely on third parties to prepare and submit, and even prosecute, applications on their behalf. (Tr. 230-232) And this is true, as the Bureau knows full well based on its experience with such companies as Nextel and Motorola, even when the application preparer is or will become a manager, reseller, and/or potential purchaser of the system. The fact that Kay advised Sobel in the application process and prepared most of the applications is entirely irrelevant. What is material and significant is that Sobel maintained full oversight and control of the application preparation process; that Sobel reviewed, approved, and signed every

[15] The Bureau also complains that the term and renewal provisions of the written agreement provide a further indicia of a transfer of control from Sobel to Kay. *WTB Findings* at 41. This of course begs the question of whether the agreement constitutes a transfer of control in the first place. As discussed above, the agreement reserves to Sobel ultimate authority, oversight, and control. This remains true regardless of the term of the agreement. Moreover, notwithstanding the lack of any express provisions, Sobel would have the ability to terminate the agreement upon failure of performance by Kay.

application before it was submitted to the Commission; that any follow-up correspondence from the Commission was directed to Sobel at Sobel's address, and was handled by Kay only at Sobel's request, direction, and oversight. Moreover, as an experienced land mobile licensee who had prepared many Part 90 applications himself, both on his own behalf and for clients, Sobel's approval was not a mere rubber stamp of Kay's actions. Sobel fully understood the process and knew what he was reviewing and approving. (Tr. 75, 206-207, 222-223)

50. As for other station policies, it must be recognized that we are not here dealing with an industry having the business complexities that attend such services as broadcasting or cellular. Sobel's stations are used to provide local dispatch communications services. This is a relatively straightforward process that involves keeping the repeaters functioning properly so that end users get service.

(d) Who is in charge of employment, supervision, and dismissal of personnel?

51. As explained during the hearing, the operation of land mobile dispatch stations is not a labor-intensive business. Sobel operates his business on a solo basis with no employees. Although Kay uses his own employees in connection with some aspects of Sobel's 800 MHz operations, (a) these functions are limited to Kay's functions as a reseller, *i.e.*, they relate solely to marketing, billing, and customer service matters, and (b) there is no evidence that Kay has ever had to hire any additional employees specifically for Sobel's 800 MHz operations. The operational aspects of the 800 MHz stations (installation, maintenance, repair, control functions, *etc.*) are handled by Sobel himself.

52. The Bureau is also incorrect in its contention that the written agreement gives Kay the right to exclude Sobel from his installation, maintenance, oversight, and other functions with respect to Sobel's 800 MHz stations. Both Sobel and Kay testified that their understanding all along, predating the written agreement, was that Sobel would perform these functions. They both also testified that they interpreted provisions in the written agreement giving Kay the exclusive right to contract for services and employees as applying to third parties, but not to Sobel. (Tr. 105-106, 113, 265-266, 350-360) Thus, the agreement merely provides that Kay may hire and use his own employees and that such personnel do not thereby become Sobel's employees. It does not prevent Sobel from hiring his own employees should he so desire. Similarly, the agreement gives Kay exclusive marketing and management rights vis-à-vis

third parties. It does not deprive Sobel of his right (inherent as licensee and expressly reserved by Section VII of the written agreement) to perform such functions himself.

(e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?

53. In constantly emphasizing the truism that Kay purchased and owns the equipment, *e.g.*, *WTB Findings* at 42, the Bureau conveniently avoids the reality that Sobel, for sound business reasons, has entered into a bona fide lease arrangement with Kay. Upon deciding to enter into the arrangement with Kay, Sobel and Kay jointly determined that it made sense for Kay to provide the equipment, primarily because he already had a large amount of equipment in inventory. As Sobel explained in his testimony, the equipment used for the 800 MHz repeaters is modular, and the various components are interchangeable. This facilitates rapid maintenance and repair. Because he operates a substantially larger number of repeaters than does Sobel, Kay had equipment on hand that could easily be diverted to the Sobel project. (Tr. 280-282) The Bureau gives the impression that Kay went out and made a special purchase of equipment specifically earmarked for the Sobel project, but this is not supported by the record. Kay testified, he does not purchase specific equipment for any particular station. He purchases quantities of equipment at one time, which he warehouses and then deploys the components on an as needed basis. (Tr. 353-354) In point of fact, when the Bureau attempted to have Mr. Kay admit to an "interest" or a "direct financial interest" in the Sobel licenses and stations, Mr. Kay stated: "Well, I have some hardware up there. If they wouldn't be doing that, they'd be doing something else." (Tr. 372) Thus, both Sobel and Kay consider the fact that Kay's equipment is used in Sobel's stations as a matter of convenience, not an indicia of ownership or control of the licenses.

54. The Bureau also mischaracterize the situation when it falsely states that Kay decided what equipment to use in Sobel's 800 MHz stations and that Kay made the arrangements with the site owners. These are determinations that were driven by circumstances rather than a decision on Kay's point. Kay already held leases at the sites in question, and no additional arrangements with the site owners was called for. As explained at hearing, the sharing of transmitter sites and equipment is common in this industry, in order to use prime mountaintop locations and to achieve economies of scale. Sobel testified that even if he had not entered into the arrangement he did with Kay, and had decided instead to purchase his own equipment and market service to end users himself, he still would have more than likely

subleased space from Kay, coordinated his services with Kay, and used equipment compatible with Kay. This would have been done not because Kay would have had any interest in or control over the Sobel stations, but simply because it would make good business and engineering sense. The bottom line is that Sobel, not Kay, made the decision what equipment to use and where to deploy it, and he made the same decisions he most likely would have made even in the absence of the marketing/resale arrangement with Kay. (Tr. 280-281, 320-321)

(f) Who receives monies and profits from the operation of the facilities?

55. The Bureau makes much (actually, far *too* much) of the fact that Kay collects all of the revenues and retains the first $600 monthly revenue per repeater. That Kay collects the revenue is consistent with his role as the reseller of airtime to end users. It does not indicate a transfer of control to Kay any more than it does in the case of any other reseller of any other wireless service. The reseller, not the facilities-based carrier, collects the fees from end users. That is the essence of the arrangement.

56. Kay's retention of the first $600 in monthly revenue per repeater is, rather than evidence of a transfer of control, and indication of Sobel's exercise of his own business judgment. In striking the arrangement with Kay, Sobel obtained significant value from Kay in exchange for the first $600 of monthly revenue. Kay assumed the nominal costs for frequency coordination and application filing fees, Kay provided the repeater equipment out of his inventory, Kay provided site and antenna space at no charge, and Kay agreed to pay Sobel for construction and maintenance services. Sobel made a business determination that these goods and services were well worth his sacrificing any share in the first $600 of monthly revenue.

57. Finally, the Bureau totally ignores the record when it states that "Sobel has not received *any* money" from the 800 MHz stations, *WTB Findings* at 28, and that "Sobel has not firm prospect of ever receiving any operating revenue from these stations." *WTB Findings* at 48. This simply is not true. The first $600 of revenue retained by Kay is in exchange for value received from Kay by Sobel, namely, equipment and site space lease and other goods an services. Moreover, Sobel structured the arrangement in such a way that some of this money would be paid to him in the form of contract payments for construction and maintenance work. The method one chooses to pull money out of his business, provided it is compliant with tax laws, should be of no concern to the Commission. Moreover,

the record shows that Sobel obtained the stations and entered into the resale arrangement with Kay in the realistic hope of making a significant amount of money therefrom. In fact, four of the fifteen 800 MHz repeaters have exceeded the $600 monthly revenue level, and Sobel testified that the others would also be profitable by now but for the Bureau's delays in processing his various applications and requests. Sobel testified that, but for this processing freeze, "today [he] would be making quite a bit of money," but for the Bureau's freeze on processing his filings. (Tr. 185)

58. Sobel has complete and unrestricted access to Kay's billing records. He monitors them on a frequent basis to determine how his stations are doing. Kay, by contrast, does not monitor this at all. Kay collects the revenue, but he does so only because Sobel has contracted that right to him. Kay retains the first $600 in monthly revenue per repeater, but only as his compensation for value give to Sobel. The Bureau has presented no evidence to contradict the soundness of Sobel's business decisions in this regard. "As long as the licensee maintains the requisite degree of control ... consistent with its status as a licensee, [the Commission] will not question its business judgment concerning the agreements into which it enters." *Motorola, Inc.* at ¶ 21.

III. THE REQUESTED SANCTIONS

59. Insofar as the Bureau has failed to carry its burdens under either the misrepresentation / lack of candor issues or the transfer of control issues, these matters should be resolved entirely in Sobel's favor and any further discussion of sanctions should be unnecessary. Nonetheless, Sobel respectfully suggests that, even assuming Sobel has transgressed Commission policy to some degree, the sanctions requested by the Bureau are far too severe in light of the circumstances.

60. The Bureau asks that the ultimate regulatory penalties be imposed on Sobel, namely, a determination that he is unqualified to be a Commission licensee, the denial of all of his pending applications and requests, and revocation of all of his licenses. The record does not warrant such severe sanctions, even assuming it is determined that Sobel may have transgressed Commission regulations or policies in some way. As demonstrated in Section I, above, it is clear that Sobel is not guilty of any intentional misrepresentation or lack of candor with the Commission. Thus, even assuming for the sake of argument that the informal arrangement between Sobel and Kay and/or the written agreement between Sobel and Kay is found by the Presiding ALJ to constitute an unauthorized transfer of control,

disqualification, denial, and revocation would not be proper sanctions. It is well established that an unauthorized transfer of control, in and of itself, is not grounds for disqualification in the unless coupled with an intent to deceive the Commission or other disqualifying conduct. *E.g.*, *Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066, 49 RR 2d 1317 at ¶¶ 63-67 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 51 RR 2d 1474 at ¶¶ 7-9 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 FCC Rcd 6342 at ¶¶ 52-58 (Rev. Bd. 1988), *aff'd* 6 FCC Rcd 6905, 70 RR 2d 18 at ¶¶ 13-20 (1991); *Roy M. Speer*, 11 FCC Rcd 18393 at ¶ 88 (1996). While this principal evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 FCC Rcd 2572, 69 RR 2d 129 at ¶ 30 (1991); *Century Cellunet of Jackson MSA Limited Partnership*, 6 FCC Rcd 6150, 70 RR 2d 214 at ¶ 8 (1991); *Catherine L. Waddill*, 8 FCC 2710, 72 RR 2d 500 at ¶ 19 (1993).

61. Of course, in this case the Bureau has not even carried its burden of showing that there has been an unauthorized transfer of control, much less that it was coupled with any deceptive intent on the part of Sobel. As shown in Section II, above, the arrangement between Sobel and Kay does not constitute a transfer of control. Sobel has at all times remained active in the affairs of his 800 MHz stations and has maintained the appropriate level of licensee oversight and control. Even if the Presiding ALJ were to find that one or more aspects of the arrangement between Sobel and Kay did constitute a transfer of control, any sanctions should not extend to Sobel's stations not subject to the arrangement, and license revocation and denial of applications is, in any event, a far too strict penalty.

62. Assuming *arguendo* the record supports a finding that there has been a transfer of control, because the Bureau has failed to meet its burden of showing any intentional wrongdoing on the part of Sobel, the more appropriate remedy would be to direct Sobel to repudiate or modify the agreement to bring it into compliance with Commission policy. *E.g.*, *Ellis Thompson*, 3 FCC Rcd 3962 (Mob. Serv. Div. 1988) (cellular application granted conditioned on removal from an agreement a paragraph potentially conferring control on a third party), *affirmed on recon.*, 4 FCC Rcd 2599 (Com. Car. Bur. 1989), *affirmed on review sub nom. Ellis Thompson Corp.*, 7 FCC Rcd 3932 (1992), *reversed on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F3d 42 (D.C. Cir. 1994); *Petroleum V. Nasby Corp.*, 10 FCC Rcd 6029 (Rev. Bd. 1995), *recon. granted in part*, 10 FCC Rcd 9964 (Rev. Bd. 1995) (renewal and belated approval of an unauthorized transfer of control issued subject to a divestiture

condition), *remanded on other grounds*, 11 FCC Rcd 3494 (1996); *Regents of University of Georgia*, 10 FCC 110 and 11 FCC 71, *discussed in Regents of University of Georgia v. Carroll*, 338 U.S. 586 (1950) (Commission directed licensee to repudiate contract that constituted *de facto* transfer of control, issued a temporary renewal pending such action, disapproved modified contract on the same grounds and again issued a temporary renewal, and issued final renewal upon full compliance by licensee).

63. Even when the Commission has seen fit to go beyond merely requiring the transfer to be cured, a forfeiture is the most severe sanction typically imposed in the absence of intentional misconduct, even if the actions resulting in the transfer of control were nonetheless "willful." *E.g.*, *Rasa Communications Corp.*, 11 FCC Rcd 13243 (Mass Med. Bur. October 1996) (forfeiture imposed where "the terms of [a program services agreement] exceed[ed] the boundaries generally acceptable [thereby making] [c]onstruction and operation under the agreement ... the responsibility of the programmer" rather than the licensee); *Kenneth B. Ulbricht*, ___ FCC Rcd ___ (DA 96-2193; Mass Med. Bur.; released 31 December 1996) (forfeiture imposed on party who "willfully exercised complete control over the station prior to having obtained Commission authorization"); *Monte Corp.*, ___ FCC Rcd ___ (DA 96-1984; Mass Med. Bur.; released 27 November 1996) (forfeiture imposed where licensee "willingly allowed [another party] to assume control of the station ... [and] allowed [the other party] to continue to dominate the affairs" of the station, resulting in an unauthorized transfer of control was willful and repeated"). The record does not justify more harsh treatment for Sobel than for other FCC licensees.

64. The scope and severity of sanctions should also take into account the, assuming there was a transfer of control, not only was it unaccompanied by any fraudulent intent, it also applied only to Sobel's 800 MHz repeaters that are subject to the agreement.[16] The record clearly shows, and the Bureau has not contradicted, that Sobel had established himself as an independent land mobile radio licensee, dealer, and service technician even before he had developed any business relationship with Kay, indeed, even before Kay himself became involved in the land mobile radio business. Sobel's UHF repeaters are not part of the arrangement which applies to the 800 MHz stations. Kay was not involved in the

[16] Any pending applications and requests, including finder's preference requests, that do not expressly involve one of Sobel's existing 800 MHz repeaters are not subject to the agreement and therefore are not part of any unauthorized transfer of control that may be occasioned by the agreement.

application, licensing, or construction of the UHF repeaters, nor is Kay involved in their continued operation or the services provided via those stations in any way affiliated with Kay.

IV. CONCLUSION

WHEREFORE, it is respectfully requested that the issues in this proceeding be resolved in favor of Marc D. Sobel d/b/a Airwave Communications, and that the captioned applications and filings be processed forthwith.

Respectfully submitted,

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Dated: 21 October 1997

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Motorola, Inc., for 800 MHz Specialized Mobile Radio Trunked Systems in California, New York, New Jersey, Maryland and Virginia	)	File Nos. 507505, 507475, 507473, 507333, 507330, 507509, 508813, 508124, 508046, 507477, 507511
Application of Motorola, Inc., for Assignment of Authorization of Specialized Mobile Radio Station WRG-816 at Mount Tamalpais, California	)	File No. 558891

ORDER

Issued: July 30, 1985

1. The Private Radio Bureau has before it for consideration Petitions to Dismiss Applications of Motorola Inc., filed by Atcomm, Inc. and Big Rock Communications, Inc. The petitions were filed on October 1, 1984, and are addressed to applications filed by Motorola for new 800 MHz Trunked Specialized Mobile Radio (SMR) systems located in California at Mt. Diablo, McKittrick, Montrose, Corona, Escondido, San Diego and Grass Valley. The Petitions to Dismiss are based on allegations that Motorola, through the use of management contracts, has assumed de facto control of SMR systems licensed to Comven, Inc., Port Services Company, and Mt. Tamalpais Communications, in violation of Section 310(d) of the Communications Act of 1934, as amended. This section of the Act requires Commission approval prior to any transfers of control of a facility licensed by the Commission. 1/ It is alleged by petitioners that this unauthorized assumption of control resulted in a violation of Rule 90.627(b) which precludes, with limited exceptions, the authorization to a licensee of more than one SMR system within 40 miles until all of the channels already assigned to that licensee are at least 80% loaded. Motorola has systems in the areas in question and these systems are not all 80% loaded. The Petitioners contend that these unauthorized transfers of control of SMR systems to Motorola raise character issues concerning Motorola's qualifications to be a Commission licensee. Also before us is a Petition for Reconsideration of the denial of a Petition to Dismiss Motorola's applications for new trunked SMR systems in Hamilton and West Orange, New Jersey; Huntington, New York; Towson, Maryland and Bull Run, Virginia, based on the alleged character issues arising out of Motorola's management.

1/ Petitioners initially alleged that Motorola also had a management contract with Paging Network of San Francisco, Inc. Paging Network filed Comments stating that it never had a management contract with Motorola. Petitioners subsequently conceded this fact in their January 30, 1985, "Reply to Opposition to Joint Petition to Dismiss Application."

contracts in California. 2/ The Petition for Reconsideration was filed on January 18, 1985.

2. On December 27, 1984, petitioners also filed a Petition to Dismiss the application for assignment of authorization of Motorola for SMR system WRG-816, licensed to Mt. Tamalpais Communications, located at Mt. Tamalpais, California. 3/ Petitioners allege that Motorola contracted to receive 100 percent of the system revenues while the license remained in the name of Mt. Tamalpais Communications. The petitioners assert that the purpose of Motorola's unauthorized assumption of control and its delayed filing for assignment of authorization was to protect its application for a new system at Mt. Diablo. They also argue that Motorola delayed filing the assignment application, although it had already acquired the Mt. Tamalpais system, so that Mt. Tamalpais' application would not be removed from the top of the waiting list for additional frequencies. 4/

Background

3. Petitoners claim Motorola's management contract constitutes a *de facto* transfer of system control. They further allege that under these contracts Motorola purchases the central controller from the licensee, provides the marketing, customer billing and and system maintenance and pays the site rental in return for 70 to 80 percent of the gross receipts of a system. In support of these assertions, petitioners have submitted affidavits from Peter C. Padelford, General Partner of Big Rock Communications, and Johnny L. Champ, President of Motek Engineering Inc., stating that Motorola personnel offered them management contracts consistent with the above terms. Petitioners have also submitted a copy of an internal Motorola publication referring to Motorola-managed SMR systems as "our" systems, and a user agreement between Motorola and an end-user of a Motorola-managed SMR system which identifies Motorola as the owner-licensee.

2/ The Bureau denied the Petition to Dismiss on December 19, 1984, because the allegations of violations in California did not provide a basis for delaying the grants of Motorola's applications in New York, New Jersey, Maryland and Virginia.

3/ For a complete list of the significant filings in this case, see the attached Appendix. The twenty-eighth filing was submitted on July 1, 1985.

4/ Applications for trunked channels at 816-821/861-866 MHz are processed on a first come, first served basis. If applications cannot be processed because of lack of spectrum, they are placed on a waiting list and grants are made as channels become available. A licensee is removed from the waiting list when channels are granted to it; this includes channels received through assignment or transfer.

4. Motorola makes the following arguments in its Opposition to the Petitions to Dismiss its California, New York, New Jersey, Maryland and Virginia applications. First, it maintains that management contracts are common methods for SMR entrepreneurs to acquire the technical, marketing or financial expertise necessary to attract users. Second, it maintains these contracts provide efficient service to the end-users of private carrier (SMR) systems and optimize the return on the licensee's investment. Motorola also contends that the licensees which contract for its management services maintain the requisite degree of control over their facilities and fulfill their responsibilities as Commission licensees. This is reflected, Motorola contends, in the fact that these licensees continue to own the controller and transmitters and continue to exercise over-all supervision over the operation of their SMR systems. Motorola also submits the affidavit of Richard Wycoff, the author of the newsletter, who states that "our" referred to systems using Motorola equipment.

5. In its Opposition to the Petition to Dismiss its application for assignment of SMR station WRG-816, Motorola acknowledges that although it wanted to acquire WRG-816, it also wanted to retain its eligibility to prosecute its Mt. Diablo application. Motorola indicates it entered into negotiations to buy WRG-816 in late 1983 and signed an SMR Asset Purchase Agreement in February 1984 with a target date for the transfer of title of April 1, 1984. It anticipated that the system loading at that time would allow the maintenance of Motorola's Mt. Diablo application. Motorola concedes that it has "billed and operated" the system since April 1, 1984, and states in its submission to the Commission that it has had "de facto control of station WRG-816" since that date. Motorola also states that it did not file the assignment application for WRG-816 until April 4, 1984, and that the application was withdrawn on May 4, 1984, because Motorola believed the system was not loaded and that if the application were granted it would be precluded from pursuing its Mt. Diablo application.

6. Despite the withdrawal of the assignment application, Motorola states it orally agreed to continue to operate WRG-816 and received 100 percent of the system revenues in exchange for a monthly fee paid to Mt. Tamalpais Communications, pursuant to a Site Rental Agreement signed on March 6, 1984. Subsequently on November 27, 1984, Motorola resubmitted its application for assignment of WRG-816. Motorola states although this situation may show impropriety, it is atypical of the way it conducts its business and is a breach of its standard operating procedures. It maintains it resulted from a series of employee errors and personnel changes. Motorola also states that to prevent a reoccurrence of this type of activity it has implemented a continuous review of pending management agreements and revised its end-user agreements to reflect that it is the manager of an SMR system. Motorola requests that it be allowed to pursue its Mt. Diablo and other applications, if its assignment application is denied.

7. In order to evaulate the nature of the management contracts under dispute, on February 12, 1985, the Bureau requested Motorola to submit copies of all executed or proposed management contracts with Comven, Inc., Port Services Company and Mt. Tamalpais Communications. On February 26 Motorola submitted executed contracts concerning the management of eleven 800 MHz trunked SMR systems licensed to Comven, Inc. One management contract, covering seven systems, was dated January 4, 1984. The remaining four contracts were dated December 5, 1984. Motorola also furnished an unexecuted copy of its standard management contract which it had offered to Port Services Company. Motorola stated that negotiations with Port Services had broken off and no agreement was entered into. In addition, Motorola provided the undated SMR Asset Purchase and Site Lease Agreements which were executed with Mt. Tamalpais Communications on March 6, 1984. Motorola also provided its generic SMR Asset Purchase Agreement which includes provisions for Motorola to manage an SMR system until the Commission has approved the assignment of the license. Finally, Motorola submitted its revised SMR Mobile Radio User Agreement which it has been using since June 1984. The end-user agreement identifies Motorola as either the owner/licensee or manager of the system.

8. The terms of the executed management contracts with Comven are substantially the same as the standard contract offered to Port Services Company. The terms reflect that the licensee will provide the central controller and repeaters for the system, i.e., the necessary radio equipment. The services provided by Motorola under contract are installation, including antennas and cables; testing of equipment; payment of antenna site charges; maintenance; marketing, promotion and sales; customer billings and collections; and updates to systems software. Any costs or additional equipment and supplies associated with these services or the operation of the SMR system are to be paid for or provided by Motorola. As compensation for these services Motorola receives 70 percent of the monthly gross collections received from end-user customers of the systems. 5/ The contracts are effective for ten years and are renewable at Motorola's sole option for an additional five years. Any default or breach of the management agreement which is not remedied within 30 days is grounds for termination by either party.

5/ The management contract for Comven, Inc.'s 10 channel SMR station KNDB-962 located at Monument Peak, California provides that Motorola will receive 65 percent of the gross receipts.

9. In addition to the above services provided by Motorola, provisions which were not included in the January 4 management contract were added to the December 5 contracts. These provisions require Motorola to notify all end-users that Comven, Inc., is the system licensee and that service is being offered under a management contract with Motorola serving as the agent for Comven, Inc. Motorola is also required to ensure Comven can access the system's central controller.

10. The generic Asset Purchase Agreement, which Motorola states it uses when it wishes to acquire an existing SMR system through assignment, contains a provision incorporating a contemporaneous management contract wherein Motorola manages the purchased system pending Commission approval of an assignment application in return for 100 percent of the revenues. Although the Asset Purchase Agreement entered into by Motorola and Mt. Tamalpais Communications did not contain such a provision, their Site Lease Agreement provided, in paragraph 20, that if Commission approval had not been obtained by the time the agreement was executed, Motorola would operate the system under Mt. Tamalpais' license until the assignment was granted by the Commission. In addition, Motorola stated that after the assignment application was withdrawn on May 4, 1984, Motorola and Mt. Tamalpais orally agreed that Motorola would manage the system in return for 100 percent of the revenues.

11. On April 24, 1985, the Bureau requested Motorola to provide additional information. Motorola was asked to describe in detail the nature and extent of Comven's responsibilities as a licensee with respect to each of the management contracts previously submitted. The letter also requested Motorola to provide the basis for its view that these agreements did not constitute transfers of control or violations of Rule 90.627(b). Motorola responded on May 15, 1985. It pointed out that the agreements with Comven provided that Motorola would perform all its managerial services under the supervision and pursuant to the instructions of Comven. Motorola further noted that Comven continues to be the licensee of the system and is the entity responsible to the Commission for the operation of the system and compliance with Commission rules. Motorola further pointed to the additions to the December 5, 1984 agreements providing it would notify all users that Comven was the system licensee, requiring it to provide Comven with the information necessary to access the systems' central controllers, and mandating the involvement of Comven in establishing the price schedule and any modifications thereto.

12. With respect to the question of transfer of control, Motorola asserted that its management contracts with Comven were consistent with the Commission's policy. Thus, it stated that Motorola had no ability or right to determine Comven's policies or operations, or to dominate its corporate affairs, since it managed the system under the supervision and in accordance with the instructions of Comven under agreements which covered day-to-day management activities. Motorola further set forth that it held no stock in Comven and was not a major creditor of Comven.

13. On April 29, 1985, the Bureau addressed questions to Comven. The questions concerned the officers, directors, shareholders and employees of Comven, the purchase price and financing arrangements for the central controllers and repeaters for the Comven systems managed by Motorola and the duties performed by Comven to exercise control of its systems. Comven responded on May 22, 1985. It also submitted additional information, orally requested by the Bureau, on June 4, 1985. The responses revealed that Comven is a publicly held corporation with over 150 shareholders. The two major owners are James E. Treach and David I. Jellum, who each own 28.5% of the company and are the Chief Executive Officer and President, respectively. Comven has 31 employees variously located in Phoenix, San Diego, Dallas and South Gate, California. Eight of them, including Jellum and Treach, have previously been employed by Motorola. Comven stated that it owned the central controllers and repeaters on its systems managed by Motorola, that they were purchased for various prices between $36,000 and $38,541 and that all the purchases were financed by Associates Capital Services Corporation, a subsidiary of Associates Corporation of North America. Finally, Comven set out the specific aspects of its agreements with Motorola which it contends allows it to maintain regular oversight of Motorola's activities. According to Comven, the following are among those factors: (1) ownership of the central controller and repeaters; (2) access to the central controller which allows it to prevent operation on the system; (3) receipt of copies of end user contracts, monthly computer analyses of billing generated and copies of work tickets for service and maintenance on the system; (4) the assignment of Marcia Jellum to full-time responsibility for overseeing th management of the systems.

Discussion

14. Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), provides that no station license can be transferred, assigned, or disposed of in any manner either directly or by transfer of control of a corporation holding the license without the prior approval of the Commission. This requirement is implemented in the Private Radio Services by Rule 90.153. The Act contemplates every form of control, actual or legal, direct or indirect, negative or affirmative, so that actual control may exist by virtue of special circumstances although there is no legal control in the formal sense. Lorain Journal Company v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). See also, Rochester Telephone Corp. v. U.S., 23 F. Supp. 634 (W.D.N.Y. 1938), aff'd 307 U.S. 125 (1939). In determining whether a transfer of control has occurred within the meaning of the Act, the Commission looks beyond mere title or legal control and considers the totality of the circumstances to ascertain where actual control lies. Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981); George E. Cameron, Jr. Communications, 91 FCC 2d 870 (Rev. Bd. 1982).

15. The Commission has recognized that with the diversity of fact patterns which can arise in the business world, no precise formula for evaluating questions of transfer of control can be set forth. News International, PLC, 97 FCC 2d 349 (1984). However, it has said that "[g]enerally the principle indicia of control examined to determine whether an unauthorized transfer of control has occurred are control of policies regarding (a) the finances of the station; (b) personnel matters and (c) programming." S.W. Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

16. The issues in this case are (1) whether Motorola's management contracts with Comven places Motorola in control of these Comven systems without the requisite authorization of assignment from the Commission and (2) if such an unauthorized assignment has occurred, whether there has also been a violation of the 40 mile rule with respect to Motorola's systems. Although there are numerous cases involving transfers of control in the broadcast area, this is a case of first impression in the private radio area. Obviously, the question of programming does not arise in a radio service which serves as a conduit for the communications of other parties. Since the Commission has different interests with respect to the broadcast services than it does for private radio, a different standard from that enunciated above may be appropriate. In this regard, the Commission has recognized that broadcast licensees have a responsibility for the content of the information which they disseminate that radio services which serve as mere conduits or transmssion links do not. Cablecom General, Inc., 87 FCC 2d 784 (1981).

17. The Commission has dealt with the issue of licensee control of a radio system in the Private Radio Services when discussing multiple licensed and cooperative use radio systems. 6/ In Multiple Licensing - Safety and Special Radio Services, Docket No. 18921, 24 FCC 2d 510, 519 (1970), the Commission said that the licensee should have a proprietary interest, as an owner or lessee, in its system's equipment which would not be taken over by third parties that it hired to dispatch. This would give the licensee the ability to exercise the degree of control of its system which was consistent with its status as a licensee and the regulation of the private radio service. In subsequent decisions, the Commission did not alter this basic test for determining licensee control of a system. 7/

6/ See Rules 90.185 and 90.179, respectively.

7/ For a complete history of these proceedings see, Tenative Decision and Further Inquiry and Notice of Proposed Rule Making, FCC 81-263, 46 Fed. Reg 32038 (June 19, 1981); Report and Order, Docket No. 18921, 89 FCC 2d 766 (1982) and Memorandum Opinion and Order on Reconsideration, Docket No. 18921, 93 FCC 2d 1127 (1983).

Finally, the Commission concluded that the determining factor concerning licensee control of a system is "that the licensee in fact exercises the supervision the system requires." Memorandum Opinion and Order on Reconsideration, supra n. 6, at 1133.

18. These standards are useful when examining the question of licensee control and management contracts for SMR systems. With respect to cooperative radio systems, the Commission has said that it will "allow licensees to contract with third parties to serve as the licensees' agents and handle day-to-day operations of their systems." John S. Landes, 77 FCC 2d 287, 291 (1980). In the broadcast services, the Commission has held that it is concerned with "the basic policies and ultimate control of the station. Day-to-day operation by an agent or employee, guided by policies set by the licensee are not inconsistent with [Section 310(d) of] the Act." S.W. Texas Public Broadcasting Council, supra, at 715 and n.2. In National Association of Regulatory Utility Commissioners v. FCC, 525 FCC 2d 630 (D.C. Cir 1976), which affirmed, inter alia, the Commission's authority to create and regulate private carrier systems, such as the ones at issue here, the court acknowledged the Commission's broad discretion to experiment with new regulatory approaches for the purpose of encouraging and maximizing the use of this new radio spectrum. The Commission began licensing SMR systems in 1978 but it took some time for the SMRS business to become well established. More recently we have witnessed an explosive growth in the SMR industry. Entrepreneurs have invested in SMR systems in all major cities throughout the country. As the SMR industry has matured, licensees have inevitably sought to avail themselves of a variety of methods to operate and manage their systems. In this dynamic and developing marketplace we wish to allow maximum flexibility to these entrepreneurs, consistent with the regulatory restraints imposed by the Communications Act. We also wish to assure licensees may employ a variety of options so that they may provide an efficient and effective communications service to the public as quickly as possible. In light of these public policy objectives, and as a general proposition, we see no reason why SMR licensees should be precluded from hiring third parties to manage their systems provided that the licensees retain a proprietary interest, either as owner or lessee, in the system's equipment and exercise the supervision the system requires.

19. Turning to the specifics of the Motorola management contracts with Comven, the Bureau finds that an unauthorized transfer of control has not occurred. Comven owns both the repeaters and the central controller for each system. The financing is with a finance company which is independent from Motorola. Additionally, there is no evidence that Motorola sells any equipment to Comven for a reduced price in return for managing the system. Petitioners have not presented any facts which distinguish Comven's purchase of Motorola equipment from any other SMR licensee purchasing equipment from

Motorola. 8/ Further, the contracts provide that Motorola must perform its functions pursuant to the supervision and instructions of Comven. Should this fail to occur Comven can terminate the agreement and exercise full responsibility over all matters involving the operation of the systems. See S.W. Texas Public Broadcasting Council, supra, at 716.

20. Since Comven owns the systems and exercises appropriate supervisory control over them, we are not concerned with the division of gross revenues for management services. As long as a licensee maintains the requisite degree of control necessary and consistent with its status as a licensee, we will not question its business judgment concerning the agreements into which it enters.

21. While we have concluded that Motorola's management agreements with Comven did not result in an unauthorized transfer of control, we cannot reach the same conclusion with respect to its involvement with Station WRG-816, licensed to Mt. Tamalpais Communications. Motorola has stated that pursuant to a site rental agreement in which it paid Mt. Tamalpais a monthly fee, Mt. Tamalpais transferred authority to maintain and operate its system to Motorola on April 1, 1984. On that date, the end-user agreements were transferred from Mt. Tamalpais' name to Motorola, Motorola began operating the system, billing the users and receiving 100 percent of the revenues generated by the system. Motorola itself has characterized this situation as a "de facto transfer of control."

22. Motorola argues that this unauthorized transfer of control occurred because no management agreement was entered into. However, the standard management contract submitted by Motorola, which it states it uses in situations where it is acquiring a system, provides for essentially the same terms as the oral agreement it had with Mt. Tamalpais, including Motorola's receipt of 100 percent of the proceeds. We fail to see how reducing such an agreement to writing removes it from the category of unauthorized transfer of control. With respect to management contracts executed in connection with the assignment of an SMR system, as the Commission stated in Stereo Broadcasters, Inc., supra, at 94, "when a prospective purchaser exercises management authority, premature transfer of control may result." It is clear that Mt. Tamalpais' April 1 transfer of its proprietary interest in and control of WRG-816 to Motorola for a monthly rental fee constituted an unauthorized transfer of control.

8/ While petitioners have intimated that such may be the case, they have presented no evidence to that effect.

23. In Storer Broadcasters, Inc., supra, the Commission denied a renewal application where it found that the parties had conducted a continuing effort to conceal an unauthorized transfer of control from the Commission. However, in Deer Lodge Broadcasting, Inc., 86 FCC 2d 1066 (1981), where the Commission determined that there was no intent to violate the Act or rules and no attempt to conceal the transfer, the Commission concuded that a forfeiture and short term renewal were appropriate. The facts in this case do not indicate that Motorola or Mt. Tamalpais entered into their agreement with an intention to violate the Act or Rules. A management contract in the Specialized Mobile Radio Service is a new development in the SMR community. As a result, licensees had few guidelines upon which to base their transaction. Moreover, Motorola has provided complete details concerning its relationship with Mt. Tamalpais and has admitted the impropriety of its conduct. Thus, while approval of Motorola's belated request for assignment of WRG-816 is inappropriate, we conclude, consistent with Deer Lodge, that the ultimate sanction of denial of Mt. Tamalpais' pending renewal application is not warranted.

24. Accordingly, Motorola's application for the assignment of station WRG-816 will be dismissed. Mt. Tamalpais' renewal application for WRG-816 will be renewed for only a one year term. Finally, Mt. Tamalpais' eligibility as a waiting list applicant for additional frequencies for WRG-816 terminated on April 1, 1984, the date Mt. Tamalpais transferred control of the station to Motorola. Therefore, Mt. Tamalpais' waiting list application is dismissed.

Conclusion

25. The Bureau has determined that it is permissible for licensees to hire entities to manage their SMR systems, provided that licensees do not contract away their control of the system. At a minimum, this means that a licensee must have a bona fide proprietary interest and that it exercise the supervision over the system that it requires consistent with its status as licensee. Based on this standard we have found that the management contracts executed between Motorola and Comven were proper. However, we also find that Motorola assumed de facto control of WRG-816, licensed to Mt. Tamalpais, Inc., without Commission approval. In spite of the guidelines provided in this order, we note that, as the Commission has reiterated many times, the question of whether a transfer of control has occurred can only be determined after an evaluation of the facts in each case. Therefore, in doubtful and borderline cases, doubt should be resolved by bringing the complete facts of the proposed transaction to the Commission's attention for a ruling in advance of any consummation of the transaction. WWIZ, Inc., 36 FCC 561, 578 (1964), recon. denied 37 FCC 685, aff'd sub nom. Lorain Journal Company v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

26. Accordingly, the Atcomm and Big Rock Petitions to Dismiss filed against the Motorola applications for SMR systems located in California at Mt. Diablo, McKittrick, Montrose, Corona, Escondido, San Diego and Grass Valley are DENIED; 9/ the Atcomm and Big Rock Petition for Reconsideration of the Bureau's denial of their Petition to Dismiss Motorola applications for SMR systems in Hamilton and West Orange, New Jersey; Huntington, New York; Towson, Maryland and Bull Run, Virginia is DENIED and the Atcomm and Big Rock Petition to Dismiss the assignment application of Motorola is GRANTED. Therefore, Motorola's assignment application for SMR sytem WRG-816 licensed to Mt. Tamalpais Communications is DISMISSED, Mt. Tamalpais' waiting list application for additional frequencies is DISMISSED and Mt. Tamalpais' renewal application will be granted for a one year term.

Robert S. Foosaner
Chief, Private Radio Bureau

9/ Of the applications listed, only the one for San Diego was selected in the lottery. It was granted conditionally pending the outcome of this proceeding.

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 21st day of October, 1997, I caused copies of the foregoing *REPLY TO WIRELESS TELECOMMUNICATIONS BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW* to be sent by first class United States mail, postage prepaid, except as otherwise indicated below, to the presiding officer and the parties in WT Docket No. 97-56, as follows:

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